MOUNTAIN VALLEY LUMBER, INC.,	)	**AGBCA No. 2003-171-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Alan I. Saltman, Esquire	)	
Richard W. Goeken	)	
Saltman & Stevens, P.C.	)	
1801 K Street, N.W.	)	
Suite M-110	)	
Washington, DC 20006	)	
	)	
Representing the Government:	)	
	)	
Kenneth S. Capps, Esquire	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
P. O. Box 25005	)	
Denver, Colorado 80225-0005	)	

RULING ON MOTIONS OF FOREST SERVICE AND APPELLANT FOR RECONSIDERATION OF RULING OF JUNE 30, 2005

January 13, 2006

Opinion for the Board by Administrative Judge POLLACK.

On June 30, 2005, then-presiding Judge Anne Westbrook issued a Ruling on various discovery issues in the above-captioned proceeding. Thereafter, the Board received several responses from both the Forest Service (FS) and Appellant, among which were motions seeking reconsideration of parts of the Ruling. In addition, the Board received motions from Department of Justice (DOJ) and Council for Environmental Quality (CEQ). In one motion DOJ asked the Board to grant DOJ and CEQ the status of interveners for purposes of discovery issues and in the other motion it asked the Board to reconsider that portion of Judge Westbrook's Ruling that dealt with whether discovery against DOJ and CEQ could legally be achieved through the FS, or instead had to be achieved by subpoena to those entities.

Judge Westbrook retired in August 2005. The appeal has been assigned to the undersigned, as the presiding judge. The Motion of DOJ and CEQ for Intervention has been addressed in a separate Ruling, where intervention has been denied. In this Ruling, the Board will (1) address the issues raised as to discovery, (2) address the request of the FS for the Board to move forward with summary judgment on certain counts, (3) address the request for the Board to clarify that the FS and not DOJ and CEQ are the parties to the dispute and (4) address Appellant's request for the Board to reconsider the rejection of Appellant's arguments as to the "at issue waiver." In addition, the Board will provide below direction as to how the remaining discovery is to be conducted. In ruling, the Board has considered the arguments raised in both the FS and DOJ Motions for Reconsideration, as well as the arguments raised by Appellant.

PROPER PARTY FOR DISCOVERY

A principle issue raised on reconsideration is the assertion by the FS (along with DOJ and CEQ) that the Board erred in ordering that the FS was responsible for producing documents in the possession of DOJ and CEQ, and that a direction to the FS was also a direction binding on the other two entities. Central to the above are concerns as to the identification of the party and the relationship of the FS, DOJ and CEQ on discovery matters, where only the FS was in direct privity of contract with Appellant.

The FS (as well as DOJ and CEQ) in seeking reconsideration have asked the Board to reconsider what they characterized as the conclusion in Judge Westbrook's Ruling relating to the proper party for discovery. They take exception to Judge Westbrook's statement (relating to discovery) that the party appellee in this proceeding is the "United States of America" and not the Secretary of Agriculture. DOJ, in its motion, expressed the following concern, stating, "Based on the MVL Order, arguably both in this proceeding and in future appeals to the Board, a contractor could merely serve discovery requests on USDA counsel and obtain discovery from DOJ, CEQ or other non-USDA agency." DOJ then went on to contend that such a result was contrary to the Contract Disputes Act (CDA) and Agriculture Board of Contract Appeals (AGBCA) rules. Noteworthy, in DOJ's motion to intervene is the expressed concern that the Mountain Valley Lumber (MVL) Order directed Interveners to respond to discovery requests served on USDA counsel without any opportunity for DOJ or CEQ to challenge the discovery order and with those agencies being not in privity to the contract in issue. The FS and DOJ argue that FS counsel has no authority to represent other agencies. Both the FS and DOJ ask that the Board change its Ruling to clarify that the FS is the party in this proceeding and not the United States. From the perspective of the Government entities, this would acknowledge and thus dictate that any discovery aimed at DOJ and CEQ as to the Heartwood litigation, must be requested separately from those entities.

The Board points out, that in several places in its briefing, DOJ has asserted that the proper and "required procedure" for seeking documents from an agency not a party to the contract is through the Board subpoena process. DOJ contends that what DOJ objects to is the proposition that a party such as Appellant can make a single discovery request to a contracting entity such as USDA and that request would be binding on government agency not a party to the contract. DOJ reads Judge

Westbrook's Ruling in MVL to portend that this Board sees the United States of America, including all federal agencies, as the "party" to this contract dispute and does not give due weight to the fact that this dispute arises out of a contract between Appellant and a single agency, USDA.

DOJ appears to acknowledge that Appellant has a right to seek discovery of documents from it and CEQ (subject to normal protections), but here takes the position that such right requires Appellant to present a subpoena to DOJ or CEQ and not to the FS. The FS agrees with the position of DOJ. Appellant in contrast asserts that it should be able to make a single discovery request to FS counsel, and that request should be binding on other Government agencies, who are in control of documents being sought. In an earlier conference call with the current presiding judge, counsel for Appellant had indicated a reluctance to submit separate requests for a subpoena to DOJ and CEQ on the basis that the discovery request that has been submitted was legally adequate and proper. This same reluctance was reflected in a later letter where counsel for the Appellant clarified that any statements it made, regarding the Board issuing a subpoena to Justice, should not be taken as admission that Appellant does not consider the United States to be the party. In the last conference with the parties, counsel for Appellant indicated a willingness to ask for a subpoena. The Board recognizes that Appellant has not abandoned its legal position, but wishes to move matters forward.

The role of the Board is to resolve contract disputes and to do so in as expeditious a manner as practicable. That role includes managing litigation. In ruling as she did, Judge Westbrook had implicitly concluded that the fairest and most expeditious process was for the FS to be responsible for securing documents, since the documents being sought from DOJ and CEQ related to a FS matter. She pointed out that as to the documents being sought from DOJ, any such documents were in DOJ's hands as a result of its representation of the FS in Heartwood. She fully expected that the FS would coordinate with DOJ and CEQ to assure that their interests were protected and that notwithstanding initial reluctance, DOJ and CEQ would be cooperative in that effort.

Judge Westbrook has retired, and the case has been reassigned. The Board continues to have before it a dispute over discovery, which in the current state appears likely to lead to additional litigation on the technicalities of discovery. The Board is being told by Counsel for the FS that DOJ and CEQ will not provide him the documents absent a subpoena to those entities. DOJ has filed a motion with the Board so as to protect it and CEQ's interests. While it would be of academic interest to fully sort out the respective relationships of DOJ, CEQ and the FS in this case; from the Board's perspective, that would not necessarily move the case forward in the most expeditious manner, and would instead have the parties engaging in a legal debate to reach a result which can be accomplished, in the Board's view without such effort. As the Board sees it, there is an alternative approach, which will essentially accomplish the same result as Judge Westbrook's Ruling (getting the documents into the hands of Appellant), but without the extra step of litigating the issues of authority of the FS vis-a-vis DOJ and CEQ.

The Board has considered its options. At this juncture, the Board does not intend to get hung up on the resolution of the issue of who is the party or whether the Board can enforce a direction to the FS against DOJ or CEQ. Rather, given the discretion of a new presiding judge and what I see as a

reasonable alternative, the Board will at least for now take a different tact. DOJ, in its briefing has indicated that it acknowledges an obligation to respond to a subpoena directed to it. The Board intends to hold DOJ and CEQ to that.

The Board Rules provide at Rule 21, subpoenas can be issued on the initiative of the Administrative Judge to whom a case is assigned or can be issued at the initiative of a party. DOJ has conceded several times in its briefing that subpoenas to it and CEQ are the appropriate way to secure documents. To move the matter forward, the Board will therefore issue subpoenas, which will follow shortly, to DOJ and CEQ to produce various documents. By proceeding in this manner, the Board does not here make a legal conclusion on the issue of the identity of the party. Rather, the Board simply moves the processing of this appeal in a parallel direction, which the Board expects will be more efficient and cost effective for the parties than having them engage in a continuing legal contest over authority.

The anticipated Board subpoenas to DOJ and CEQ will essentially deal with the classes of documents asked for by Appellant in its interrogatories to the FS. To the extent that I modify Judge Westbrook's earlier ruling, the modifications apply to the DOJ and CEQ documents. That means for example, that the matter of relevance is not an appropriate basis for denying production of the documents. The ruling of Judge Westbrook on that matter stands. The Board here reiterates, that the documents relating to Heartwood and to the determination to use a Categorical Exclusion are relevant. So too, although potentially more tenuous, are documents relating to the decision not to appeal or fight the Heartwood decision. All documents are, of course, subject to a privilege, if appropriate. But in order for the Board to determine that a documents is subject to withholding due to privilege, the withholding party needs to identify the document in a log and must explain the basis of the privilege as to the document in issue. Any attempt by DOJ to refuse to produce records in its possession or not to include them in a log, because of a claim of lack of relevance will be denied. That matter has already been considered.

As to issues surrounding attorney-client, work product and deliberative process, the Board will entertain objections from DOJ and CEQ on those matters. However, the Board will not accept blanket objections. Rather, if DOJ or CEQ contends that a document is covered and therefore not releaseable, then the Board expects that such document will be identified on a log, along with a sufficient explanation as to why it cannot be released. The communications need to be identified with enough factual detail so as to give Appellant a fair opportunity to respond to the substance of the proponent's claims of privilege. If portions of a document can be released they should be so identified. As part of the identification in the log, DOJ and CEQ are to identify not only the author and addressee, but also anyone else who received that letter or communication. If DOJ or CEQ raises privilege and Appellant so objects, the Board will then review the material and determine what can and what cannot be protected. The Board will also be prepared, where appropriate, to view documents *in camera*. That all being said, the Board will expect, absent an interlocutory appeal, that the documents being subpoenaed for which the Board finds Appellant to be entitled, will be provided and that the Board subpoenas will be treated in the same manner, as would a Court

subpoena. The Board chooses here not to lay out the potential impacts of a failure to cooperate, and how that will affect the ultimate outcome of the appeal before the Board.

RENEWED REQUEST BY APPELLEES FOR SUMMARY JUDGMENT ON COUNT I AND COUNT II AND FOR RECONSIDERATION OF RULING ON INTERROGATORIES THAT 4-10 AND 13-15 BE STRICKEN

Judge Westbrook ruled that she would not decide summary judgment in her Ruling, as there was discovery that still remained to be completed. That position was well reasoned and stands. The record remains to be more fully developed.

Moreover, in making its argument for summary judgment, the FS asserted that the test is one of bad faith. That is not correct. An action or actions can be unreasonable even if performance was made in good faith. A number of cases both at the Board, the Court of Federal Claims and Court of Appeals for Federal Circuit have made it clear that deciding breach in this type of case is intensely factual. Accordingly, we will not consider summary judgment until Appellant has an opportunity to complete more discovery.

As to the FS argument that an item can be relevant only if the FS knew or should have known, the FS again takes too narrow a view. What the FS should have known does not necessarily require that FS officials had actual knowledge. Clearly, actual knowledge creates a more obvious case. The further away from FS knowledge or involvement a matter gets, the more difficult it will be for Appellant to show that the FS acted in an unreasonable manner. However, that all being said, this proceeding is still in discovery and the purpose of discovery is to enable a party to see if there is information which would lead to further admissible evidence. Moreover, Interrogatories 4-10 (which the FS contended were not relevant) asks for information tied into statements in the Schroeder declaration, dealing with handling of Categorical Exclusions. The decision to use a Categorical Exclusion is inherently relevant to MVL claims. Accordingly, Interrogatories 4-10, as well as 13-15 are not stricken and the FS is to provide the answers and documents.

DOCUMENTS OGC-3 AND OGC-9

The Board as noted above, is not at this point ruling on Summary Judgment. The FS has requested that before the Board order the release of the above documents, the Board review the documents *in camera*. OGC-3 is clearly protected attorney-client communication. The content is not such to cause the Board to override that privilege. As to OGC-9, while it is work product and could be protected, the information being protected is edits to a proposed letter. Based on the Board review, there is no reason to leave the document a mystery. Accordingly it is to be released.

DELIBERATIVE PROCESS ARGUMENTS

The Board understands that the parties have arrived at an agreement on how to handle the documents for which the FS has invoked a deliberative process. Accordingly, there is no need to address the arguments presented.

APPELLANT'S REQUEST FOR RECONSIDERATION OF AT ISSUE WAIVER

In order to benefit from an at issue waiver, the party seeking protection must be the one putting the matter in issue. Among the necessary elements to sustain an at issue waiver, the assertion of the privilege needs to be the result of some affirmative act, such as filing suit, by the asserting party. We agree with Appellant that introducing a new element by an affirmative defense, might well trigger the waiver. However, here the FS has introduced no new element. Appellant's claim can only succeed under the law, if Appellant can show that the FS acted unreasonably. The matter of reasonableness was thus put on the table by the Appellant's filing and not newly introduced by the FS.

There is a policy to protect confidential attorney-client relationships. The at issue waiver exception comes in when a party chooses to introduce new elements as a sword, that are however directly tied to communications between attorney and client. That has not happened here. Attorney-client privilege, however, is not absolute and the protection can be weighed against the benefits of release.

The Board has considered the various arguments set out by Appellant in its motion as to the at issue waiver and agrees with Judge Westbrook's initial ruling that no "at issue waiver" exists in this proceeding. The Board also recognizes however, that even if not waived, Appellant is still entitled to seek review of documents, on an individual basis, for which privilege is claimed. If necessary such documents will be reviewed *in camera*.

_____

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, DC
January 13, 2006